

IN THE  
UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of )  
Regents of the University of California )  
                       )  
Serial No. USSN 09/677,592 )  
                       )  
Filed: October 2, 2000 )  
                       )  

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In re Application of )  
Regents of the University of California )  
                       )  
Serial No. PCT/US00/27462 )  
                       )  
Filed: October 2, 2000 )  
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In re Application of )  
Fred Hutchinson Cancer Research Center )  
and Rockefeller University )  
                       )  
Serial No. USSN 09/679,411 )  
                       )  
Filed: October 2, 2000 )  
                       )  

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In re Application of )  
Fred Hutchinson Cancer Research Center )  
and Rockefeller University )  
                       )  
Serial No. PCT Unknown )  
                       )  
Filed: October 2, 2000 )  
                       )  

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In re Application of )  
Fred Hutchinson Cancer Research Center )  
                       )  
Serial No. USSN 09/679,104 )  
                       )  
Filed: October 2, 2000 )  
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In re Application of )  
Fred Hutchinson Cancer Research Center )  
                        )  
Serial No. PCT Unknown )  
                        )  
Filed: October 2, 2000 )  
In re Application of )  
Fred Hutchinson Cancer Research Center )  
                        )  
Serial No. USSN 09/678,952 )  
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Filed: October 2, 2000 )  
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In re Application of )  
Fred Hutchinson Cancer Research Center )  
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Serial No. PCT/US00/27430 )  
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Filed: October 2, 2000 )  
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In re Application of )  
University of North Carolina )  
                        )  
Serial No. USSN 09/678,953 )  
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Filed: October 2, 2000 )  
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In re Application of )  
University of North Carolina )  
                        )  
Serial No. PCT/US00/27429 )  
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Filed: October 2, 2000 )  
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In re Application of )  
University of North Carolina )  
                        )  
Serial No. USSN 09/679,663 )  
                        )  
Filed: October 2, 2000 )  
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In re Application of )  
University of North Carolina )  
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Serial No. PCT/US00/27428 )  
                            )  
Filed: October 2, 2000 )  
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Assistant Commissioner for Patents  
Office of Petitions  
Washington, DC 20231

BY HAND

**PETITION TO FIX FILING  
DATE AS OCTOBER 2, 2000**

The rules of the United States Patent and Trademark Office (USPTO) provide “[a]ll situations not specifically provided for in the regulations” will be decided “in accordance with the merits of each situation.” 37 C.F.R. § 1.182. The rules also provide that any regulatory requirement which is not based on a statutory command may be suspended or waived in “an extraordinary situation, when justice requires.” 37 C.F.R. § 1.183. Because the situation herein is “not specifically provided for in the regulations,” Petitioners request that the USPTO fix the filing date for twelve patent applications as October 2, 2000. In the alternative, because of the presence of an “extraordinary situation,” Petitioners request that 37 C.F.R. § 1.10, as “justice requires,” be suspended or waived insofar as necessary to fix a filing date for twelve patent applications as October 2, 2000. This Petition is accompanied by the \$130 petition fee set forth in Section 1.17(h). 37 C.F.R. §§ 1.182 & 1.183.<sup>1</sup>

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<sup>1</sup> If the USPTO decides that any additional administrative fees should be assessed, please charge any such additional fee payment to Deposit Account No. 50-0436.

## BACKGROUND

On October 2, 2000, the patent group of Pepper Hamilton LLP ("Pepper") was completing twelve patent applications for filing on that day. Six inventions were involved.<sup>2</sup> Two inventions were being filed on behalf of the University of North Carolina ("UNC") and four inventions were being filed variously on behalf of the Fred Hutchinson Cancer Research Center, the Regents of the University of California and the Rockefeller University ("Fred Hutch"). For each invention, Pepper was preparing an application for US patent rights and an application for PCT patent rights.

The Pepper patent group's filing productivity was significantly impacted by the acute flare up of a medical condition experienced on October 2, by a Pepper legal assistant -- Courtney J. Brooks. Ms. Brooks was assigned the filing mechanics for the UNC inventions and made the late-night filing of all twelve applications at the USPTO mail room. Together these tasks were materially delayed as a result of the acute flare up of her medical condition.

Ms. Brooks, who is no longer employed by Pepper, suffers from Fibromyalgia Syndrome ("FMS") -- a physical disability which affects the muscles and connective tissues of the body. In addition to pain and impaired mobility, FMS symptoms frequently include impaired memory and impaired concentration. When Ms. Brooks was hired by Pepper, she disclosed that she had FMS -- which during flare periods subjected her to severe chronic pain and periods of limited mobility. During these flare periods, Pepper was informed that Ms. Brooks exhibited reduced functionality in her limbs and required a cane to walk. See Verified Statement of Judith G. Caratenuto attached as Appendix B at Tab B of the Appendix to this Petition.<sup>3</sup>

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<sup>2</sup> As a matter of short-hand reference, the list of six inventions may be referred to as MAD2, MEC1, Clonal, Bipotent, SIC1 and Telomere. The UNC inventions are Clonal and Bipotent. Fred Hutch's inventions are the remainder in this list. See Pouliquen V.S. attached as Appendix A at Tab A of the Appendix to this Petition.

<sup>3</sup> Attached hereto as Appendix C at Tab C of the Appendix to this Petition is a summary of FMS symptoms from the website of the National Fibromyalgia Research Association.

To accommodate her condition, Pepper permitted Ms. Brooks to work at home during flare periods. From her start date with Pepper of August 14 until October 2, 2000, however, Ms. Brooks only missed six work days due to FMS flare periods. While Ms. Brooks periodically seemed to be suffering from chronic pain at work, she never -- to Pepper's knowledge -- (prior to October 2, 2000) had come to work during a flare period when the FMS overcame her ability fully to carry out her duties. On October 2, she never told the Pepper lawyers directing the application filing effort that she was experiencing an FMS flare up.

In retrospect, however, it became clear that Ms. Brooks' FMS flare up materially delayed her assembly of the UNC patent applications that were assigned to her. Moreover, Ms. Brooks' FMS flare up also delayed the filing of all twelve applications to some degree since she undertook her usual responsibility of making late-night filings at the USPTO mail room. Without these delays (and even more so without the additional delay caused by a Pepper computer operating system failure on October 2), the twelve applications would have met the midnight filing deadline. See Verified Statement of Corrine M. Pouliquen attached as Appendix A at Tab A of the Appendix to this Petition.

Given that Ms. Brooks had never come to work during a flare period where her duties were compromised and given Pepper's responsibilities under the federal disability laws, Pepper did not know and could not have known that Ms. Brooks was experiencing an acute FMS flare period through the exercise of reasonable care or ordinary diligence. Only when Ms. Brooks returned to the Pepper office after missing -- by several minutes -- the midnight deadline at the USPTO mailroom in Crystal City, Virginia, did Pepper lawyers learn that she had experienced an acute FMS flare period on October 2. See Pouliquen V.S.

Upon learning that Ms. Brooks had been unsuccessful in meeting the midnight filing deadline at the USPTO mailroom, Ms. Pouliquen immediately sought to contact a patent lawyer

or agent resident in a location where it was still October 2 and to file the twelve applications by Express Mail from that location. After determining that it was not feasible to secure a California lawyer or a patent agent to file the applications, a search began for a Hawaii-based practitioner. Ms. Pouliken identified and contacted Mr. Jack E. Bennett -- an attorney and patent agent resident in Honolulu, Hawaii -- at his home sometime after 2:00 am, October 3, 2000 Washington time or after 8:00 pm October 2, 2000 Hawaii time. Mr. Bennett was chosen at random and was a stranger to the situation, with no prior connection to Pepper or its clients. See Verified Statement of Jack E. Bennett attached as Appendix D at Tab D of the Appendix to this Petition.

Mr. Bennett and the Pepper patent group then worked diligently to transfer the applications to Hawaii by e-mail and fax to permit an Express Mail filing which, under Section 1.10, would preserve the October 2 filing date. Despite the best efforts of all involved, however, only two packages (each containing as a set a US application and a PCT application) were deposited in a United States Postal Service ("USPS") Express Mail drop box at the USPS office at the Honolulu International Airport before midnight Hawaii time. Four packages (each containing as a set a US application and a PCT application) were deposited after midnight Hawaii time.<sup>4</sup>

Because Mr. Bennett arrived at the USPS facility well before midnight, had USPS window service been available then at the post office in Hawaii, all six packages would have

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<sup>4</sup> Due to the urgency of the situation, it is not known which applications were in the packages Mr. Bennett actually filed before midnight Hawaii time although Ms. Pouliken instructed him to file the UNC applications first. See Bennett V.S.; Pouliken V.S.

been presented for filing before midnight.<sup>5</sup> The Honolulu Airport post office has the latest hours of any post office on the island of Oahu. However, when Mr. Bennett arrived at the Post Office at the Honolulu International Airport at 11:40 pm on October 2, 2000, he learned it had closed its window service at 8:30 pm that evening. Mr. Bennett then also learned that the last pickup from the Express Mail drop box at the Airport post office was still earlier at 8:00 pm. All six packages containing the twelve patent applications were placed in the Express Mail drop box -- and thus lodged in the custody of the USPS -- by 12:20 am October 3, 2000 Hawaii time.

Nevertheless, at that moment, it was still October 2, 2000 in a place further west of Hawaii served by the USPS. Specifically, the USPS provides service – including Express Mail service -- to and from American Samoa. See Appendix E attached as Tab E of the Appendix to this Petition. American Samoa does not go onto daylight savings time. See Appendix F attached as Tab F of the Appendix to this Petition. Daylight savings time did not end this year until October 29, 2000. Appendix F: Thus at the moment it was 12:20 am October 3, 2000 in Hawaii, it was 11:20 pm on October 2, 2000 in American Samoa.

Consequently, the applications were deposited with the USPS when the date in a location served by the USPS was still October 2, 2000. Under the circumstances, Petitioners respectfully submit that justice requires that all twelve applications should have their filing dates fixed as October 2, 2000. At the least, since two sets of US and PCT applications were deposited before midnight in Hawaii, the four UNC applications should receive an October 2, 2000 filing date since they were more delayed by Ms. Brooks' FMS flare period than were the Fred Hutch applications and since Ms. Pouliquen instructed Mr. Bennett to file the UNC applications first when he reached the Honolulu Airport post office.

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<sup>5</sup> USPS window service is available until midnight in most major metropolitan cities across the United States. Petitioners were unaware of the unavailability of midnight window service in Honolulu. Plainly, a date stamp of

## ARGUMENT

Section 21 of Title 35 of the United States Code authorizes the USPTO to “by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Commissioner.” 35 U.S.C. § 21. The USPTO has exercised this rulemaking authority by prescribing 37 C.F.R. § 1.10. Under Section 1.10, any “correspondence received by the Patent and Trademark Office (Office) that was delivered by the Express Mail Post Office to Addressee services of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS.” 37 C.F.R. § 1.10(a). The “date of deposit with the USPS” is “shown by the ‘date in’ on the ‘Express Mail’ mailing label or other official USPS notation.” *Id.* If the “date-in” was “incorrectly entered or omitted by the USPS,” the rule permits “[a]ny person filing correspondence under this section [1.10]” to “petition the Commission to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS” if three provisos are met. 37 C.F.R. § 1.10(d) (1)-(3).

The third proviso requires that the person filing the correspondence must establish the correspondence was deposited “prior to the last scheduled [Express Mail] pickup for that day.” 37 C.F.R. § 1.10(d)(3); see also Communications With the Patent and Trademark Office, 61 Fed. Reg. 56439, 56445 col. 3 (November 1, 1996). Mr. Bennett, the “person filing [the] correspondence,” filed none of the twelve applications before 8:00 pm Hawaii time on October 2, 2000 -- the last Express Mail pick up that day at the post office at the Honolulu International

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October 2 would have been obtained but for the lack of midnight window service at the Honolulu Airport post office.

Airport. Consequently, Rule 1.10 precludes Mr. Bennett -- the person filing the correspondence -- from submitting a petition to fix the filing date as October 2, 2000 for any of the twelve applications he filed.

I. The Availability of Petition Authority Under Rule 1.182 and Rule 1.183.

A. Rule 1.182 -- A Situation Not Specifically Provided For

But Mr. Bennett is not filing this Petition -- rather it is the Petitioners who are filing this Petition. Mr. Bennett was retained by Pepper only -- and not by Petitioners -- for the limited purpose of filing the applications by Express Mail in Hawaii within the requirements of the rules for filing of USPTO correspondence by Express Mail. Mr. Bennett was retained at random with no prior connection to Pepper or its clients. Mr. Bennett is not -- as would be a mere filing service -- an agent under Pepper's (and thus the Petitioners') control. Instead, Mr. Bennett is an attorney and registered practitioner legally constrained to comport himself to the Hawaii Rules of Professional Conduct to the USPTO Code of Professional Responsibility.<sup>6</sup> See 37 C.F.R. §10.20 et. seq.

Rule 1.10 does not specifically provide for the situation herein. In the present situation, an independent practitioner (Bennett) filed correspondence for another practitioner (Pepper). Thus, the preclusive effect of Rule 1.10 applies only to Mr. Bennett, the person actually filing the applications, which are the subject of this Petition. Petitioners, however, are not precluded by Rule 1.10 from filing this Petition to fix the applications' filing date as October 2, 2000. 37 C.F.R. § 1.182.

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<sup>6</sup> Moreover, Mr. Bennett has no economic interest in the outcome of this case. In fact, Mr. Bennett has already been paid for his services and has no expectation of future work from Pepper, Petitioners, or any other of Pepper's clients. Pouliquen V.S.

B. Rule 1.183 – An Extraordinary Situation When Justice Requires

Even if they were, the extraordinary situation here and the interests of justice would require the USPTO to waive the preclusive elements of Rule 1.10. Accordingly, the USPTO may, in the alternative, accept this Petition under 37 C.F.R. § 1.183.

1. Extraordinary Situation

Under Rule 1.183, an “extraordinary situation” is not a situation which “could have been prevented by the exercise of ordinary care or diligence.” Communications With the Patent and Trademark Office, 61 Fed. Reg. 56439, 56442, col. 3 (November 1, 1996). As described in Ms. Pouliquen’s verified statement, the exercise of reasonable care could not have avoided missing the midnight filing deadline at the USPTO.

The acute FMS attack suffered by Ms. Brooks is the archetype of the sort of extraordinary situation intended by Rule 1.183. This is not a situation where Ms. Brooks deposited applications in the wrong filing location. Nitto Chemical Industry Co. v. Comer, 1994 U.S. Dist. Lexis 19211, 39 U.S.P.Q.2d 1778 (D.D.C. 1994). Nor did Ms. Brooks fail to file by midnight on October 2, 2000 at the USPTO mailroom for any other reason that could have been prevented by the Petitioners’ exercise of ordinary care or diligence. Id. Petitioners did not “make[ ] an avoidable mistake.” Id. Rather, Ms. Brooks was disabled by a medical condition that unexpectedly escalated to the point of adversely affecting the filing of the twelve applications. Ms. Brooks’ acute medical attack should not prejudice Petitioners’ rights since the attack was outside Petitioners’ control. Sturzinger v. Commissioner of Patents, 377 F. Supp. 1284 (D.D.C. 1974).

Moreover, once Petitioners learned that Ms. Brooks had missed the midnight filing deadline at the USPTO mailroom, Petitioners made an extraordinary attempt to cure the filing

date. First canvassing patent attorneys in California and then patent attorneys in Hawaii, Ms. Pouliquen of Pepper identified Mr. Bennett to assist her in filing the twelve applications in Hawaii by Express Mail under Rule 1.10. Mr. Bennett was successful in filing two Express Mail packages (each containing one US and one PCT patent application) before midnight October 2, Hawaii time, but could physically deposit the remaining four packages in the Express Mail drop box only after midnight October 2 but before 12:20 am on October 3.

Ms. Brooks' unexpected medical attack was an extraordinary situation in response to which Petitioners took extraordinary – but only partially successful – steps to overcome by filing by Express Mail in Honolulu. Consequently, the USPTO should find that Petitioners experienced an “extraordinary situation” under rule 1.183.

## 2. Justice Requires

A “lost filing date” for a patent application can “result[] in the loss of substantive rights.” Communications With the Patent and Trademark Office, 61 Fed. Reg. at 56411 col. 1. Here Petitioners patent rights could be lost or jeopardized by losing the October 2, 2000 filing date. The priority date of the provisional applications could be lost.<sup>7</sup> Moreover, there is reason to believe that there may have been disclosure of some information, which may adversely bear on the patentability of certain of the involved applications. See Nitto Chemical Industry Co. v. Lomer, *supra*. Thus “justice requires” the USPTO to exercise its authority to accept the applications as filed on October 2, 2000 under its Rule 1.183 authority.

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<sup>7</sup> The filing date of a patent application establishes a priority date which can be, and often is, critical by as little as one day. The possibility that relevant art was published, or that a competing application was filed, between the priority date and October 3, 2000 may not become known to Petitioners for some time. Such documents could have severe consequences for Petitioners’ rights in the United States and other countries should the earlier filing date of October 2, 2000 be denied.

## II. The USPTO Has Statutory Authority to Grant This Petition

In the unique circumstances of this case, the USPTO has the statutory authority to set the filing date for all twelve applications as October 2, 2000. It should so exercise that authority.

It is important to focus on the quality of the testimony concerning the filing of the applications in Hawaii. Mr. Bennett is not a pre-arranged back-up filer under Petitioners' control. Instead, Mr. Bennett is an independent attorney and practitioner -- bound by ethical canons of the Hawaiian bar and the USPTO -- who has no financial interest in the outcome of this Petition. He is thus a "disinterested third party" whose testimony should be relied on by the USPTO. See Communications With the Patent and Trademark Office, 61 Fed. Reg. 56439, 56441, col. 1 (November 1, 1996).

Moreover, Mr. Bennett's testimony is well corroborated. In an e-mail received by Ms. Pouliquen from Mr. Bennett at 8:43 am October 3 Washington DC time -- or 2:43 am October 3 Hawaii time -- Mr. Bennett meticulously describes the details of his actions regarding the filing. The e-mail also specifies the Express Mail tracking numbers, which were attached to each of the six inventions. This corroborating evidence was created within three hours of the filing at the Express Mail drop box at the Honolulu Airport post office. Bennett V.S. at Appendix A.

Later in the day of October 3, 2000 -- still within 24 hours of the filing at the Honolulu Airport post office -- Mr. Bennett wrote a letter to Ms. Pouliquen providing the temporary receipts which corresponds to the tracking numbers sent in the e-mail. Bennett V.S. at Appendix B. Mr. Bennett's verified statement also contains copies of the official label receipts he received by mail on October 6, 2000 with the same tracking numbers specified elsewhere in his verified statement.

As described in the verified statement of Ms. Pouliquen these same tracking numbers are contained in the tracking page of the USPS website which shows each of the six packages was picked up by the USPS in Hawaii between 7:18 am and 7:46 am on the morning of October 3 and arrived in Washington, DC on October 5. Moreover, as shown on the face of each application found in the USPTO files, the Express Mail tracking number corresponds to the invention specified in Mr. Bennett's verified statement.

The relevant statutory provision authorizes the USPTO to set by regulation a patent application filing date defined as "the date on which it was deposited with the United States Postal Service." 35 U.S.C. § 21. The earlier versions of Rule 1.10 show that the USPTO has statutory authority to accept an Express Mail filing on the date of deposit shown only by "a certificate of mailing by 'Express Mail' which states the date of mailing by the person mailing the paper or fee." 37 C.F.R. § 1.10(b) & (c) (superceded), 48 Fed. Reg. 2696, 2706 (January 20, 1983); see also, 49 Fed. Reg. 548, 552 (January 4, 1984). Likewise, the earlier version of the Rule 1.8, the former certificate of mailing regulation, shows that the USPTO has authority to "permit the sender to indicate on the correspondence the date of mailing or [facsimile] transmission from the sender's perspective, which date would then be effective to meet a deadline set for response." Changes in Signature and Filing Requirements for Correspondence Filed in the Patent and Trademark Office, 58 Fed. Reg. 54494, 54498 col. 3 (October 22, 1993). Indeed, the earlier versions of Rule 1.8 show the USPTO has statutory authority to accept a facsimile "transmission started before midnight, Pacific time, on the last day for response and having a certificate of transmission affixed thereto [as] timely filed even though the transmission was completed after midnight . . . and was received in the [USPTO] the day after the deadline for response." Id. at 54499 col. 1. Moreover, the USPTO exercised statutory authority to accept the date on the certificate of mailing even if the correspondence were not actually mailed on that

date so long as the "person signing the certificate [had] reasonable basis to expect the correspondence would be mailed on or before the date indicated." 48 Fed. Reg. 2696, 2708 (January 20, 1983).<sup>8</sup>

Thus Mr. Bennett's testimony establishes that the USPTO has statutory authority to accept all six packages for filing on October 2, 2000. First, it is established that six packages were set in the process of mailing before midnight -- much as the facsimile example the USPTO used in its 1993 regulations. Second, each application contained a certificate of mailing signed by Mr. Bennett and dated on October 2, 2000. Third, the remaining four packages -- containing four sets of US and PCT patent applications -- had been deposited with the USPS in Hawaii when it was still October 2, 2000 in American Samoa. Because the applications had been deposited with the USPS at a moment when the date was still October 2, 2000 in a location served by the USPS, the USPTO has discretion under the statute to deem all twelve applications as deposited with the USPS on October 2.

At any event, it is undisputed that two packages (four applications) were placed in the USPS Express Mail drop box at the Honolulu Airport post office before midnight on October 2, 2000. Because Ms. Brooks medical condition disproportionately affected the UNC applications and because those applications have a greater risk of loss of substantive rights if the earlier filing date is not secured, at least these four UNC applications should be accorded an October 2, 2000 filing date.

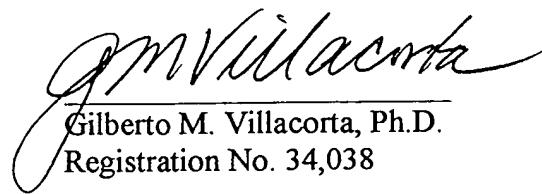
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<sup>8</sup> In fact, Mr. Bennett signed a certificate of mailing for each of the twelve applications and dated them October 2, 2000 because he had a reasonable basis to believe the Honolulu Airport post office would be open when he arrived late in the evening of October 2, 2000. Bennett V.S.

CONCLUSION

In the unique circumstances of this case, the USPTO should exercise its discretion under 35 U.S.C. § 21 to fix the filing date for all twelve applications as October 2, 2000.

Respectfully submitted,



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DC: #167946 v1 (3LL6011.DOC)

**VERIFIED STATEMENT  
OF  
CORINNE M. POULIQUEN**

My name is Corinne M. Pouliquen. I am an attorney in the patent group of Pepper Hamilton LLP ("Pepper") in Washington, D.C. and a practitioner before the United States Patent and Trademark Office (Reg. No. 35,753).

On October 2, 2000 Pepper was completing the preparation of a US and a PCT patent application for each of two inventions on behalf of the University of North Carolina ("UNC") and each of four inventions variously on behalf of the Fred Hutchinson Cancer Research Center, the Regents of the University of California and the Rockefeller University ("Fred Hutch").

The title of the two UNC inventions are:

1. "Processes for Clonal Growth of Hepatic Progenitor Cells" ("Clonal").
2. "Methods of Isolating Bipotent Hepatic Progenitor Cells" ("Bipotent").

The title of the four Fred Hutch inventions are:

1. "Interfering with Telomere Maintenance in Treatment of Disease" ("Telomere").
2. "Mutation of MEC1-Related Genes in Treatment of Disease" ("MEC1")
3. "Mutation of SIC-1 Related Genes in Treatment of Disease" ("SIC1")
4. "Targeting Cells Having MAD2 Mutation for Treatment and/or Prevention of Disease" ("MAD2")

For reasons described below, the US and PCT applications for each of the six inventions were filed in a single Express Mail package, i.e., a total of six Express Mail packages were mailed, each containing a US and a PCT application, for a total of twelve applications. Pepper recently retained Specialized Patent Services of Arlington, Virginia, to determine the serial numbers for the U.S. and the PCT applications lodged with the USPTO. The docket system at

the USPTO had not yet captured all of the filed applications. What has been captured to date is as follows:

1. Clonal -- PCT/US00/27428; No US serial number yet
2. Bipotent -- PCT/US00/27429; No US serial number yet
3. Telomere -- PCT/US00/27430; US 09/678,952
4. MEC1 -- No PCT serial number yet; US 09/679,104
5. SIC1 -- No PCT serial number yet; US 09/679,411
6. MAD2 – PCT/US00/27462; No US serial number yet

Because each of the six inventions has either a PCT or a US serial number or both, it is assumed that all six Express Mail packages containing all twelve applications (6 PCT and 6 US) have been received by the USPTO but that some applications are still awaiting completion of the docketing process.

The twelve applications for the six inventions were being put in final form throughout the day and into the evening of Monday, October 2, 2000. The plan was to file the applications at the USPTO mail room in Crystal City, Virginia, before the midnight filing deadline. One of our patent legal assistants – Courtenay J. Brooks – lived near the USPTO Crystal City offices and regularly filed late filings there on behalf of Pepper. On October 2, 2000, Ms. Brooks was asked to file the applications referenced herein at the USPTO mail room.

Ms. Brooks suffered from a medical condition called Fibromyalgia Syndrome (“FMS”) which adversely affected her muscles and connective tissue. Ms. Brooks suffered from chronic pain and occasionally suffered acute flare up periods when, being too ill to function at the office, she stayed home. However, during the period of her employment at Pepper, Ms. Brooks only stayed home a handful of days because of flare ups of her medical condition. Most importantly, despite her chronic pain, Ms. Brooks had always fully and competently completed all tasks

assigned to her -- including night filings at the USPTO mail room -- on those days when she came in the office.

Unfortunately, Ms. Brooks suffered an acute flare up of her FMS while at work on October 2. However, Ms. Brooks never disclosed to Pepper that she was experiencing an acute episode. I had no knowledge that Ms. Brooks was suffering from an acute FMS flare up until her return from the failed attempt to file the applications referenced herein in the USPTO before the midnight deadline. Together with an unforeseeable computer crash, Ms. Brooks' unexpected and undisclosed FMS flare up was the direct cause of failing to file the twelve applications before the midnight deadline.

In addition to her responsibility for personally filing all the applications at the USPTO, Ms. Brooks was assigned the task of completing the filing particulars of the four UNC applications while another legal assistant had responsibility for the filing particulars for the eight Fred Hutch applications. The Clonal application was completed and printed out at 9:22 pm.<sup>1</sup> The Bipotent application was completed and printed out at 10:06 pm.

Nevertheless, the filing particulars for the UNC applications had not been fully completed even when Ms. Brooks left the office for the ten-minute trip to the USPTO. In retrospect, the untoward lapse of nearly two hours in completing the UNC filing mechanics was a direct result of Ms. Brooks FMS attack. But for that attack, the filing mechanics of the UNC applications should have been completed by 10:30 pm leaving an hour and one half for the ten-

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<sup>1</sup> Pepper's document processing computer system permits the retrieval of the time and date stamp for drafts, revisions, and final versions of documents. The times set forth in this verified statement are the times electronically stamped on the respective applications by the server in Pepper's Washington office.

minute ride to the USPTO.<sup>2</sup> This would have permitted more than an hour and fifteen minutes more than was necessary to successfully file the UNC applications before the midnight deadline.

As to the Fred Hutch applications, the SIC1 application was completed and printed by 9:22 pm, the Telomere application by 10:44 pm and the MAD2 application by 11:14 pm. Had Ms. Brooks not been preoccupied with overcoming the impact of her FMS attack on the filing particulars of the UNC applications, she would have had ample time to file these Fred Hutch applications as well as the UNC applications before the midnight deadline at the USPTO mail room.

As for the last Fred Hutch application -- the MEC1 application – it was completed at 11:18 pm. Unfortunately, however, just as I was initiating a print of the application my computer operating system crashed. Unable to reboot immediately, I asked one of our secretaries to access the document from another workstation on our office network and print the MEC1 application. According to Pepper's computer system, the MEC1 application was printed from this other work station at 11:51 pm. The Director of IS/Technology for Pepper has tested the Washington server time clock against Coordinated Universal Time which is the Official U.S. Time.<sup>3</sup> To date, the Washington server is 3 minutes fast relative to official U.S. Time. Therefore, Ms. Brooks left around 11:48 PM for her trip to the USPTO mail room. As Ms. Brooks left, we thought that she and her driver would still make it to the USPTO before the midnight deadline if they experienced no difficulties on the car ride to Crystal City.

Unfortunately, Ms. Brooks reached the USPTO after midnight. Ms. Brooks would have made the filing deadline had her physical condition not been the extreme one which I observed

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<sup>2</sup> On October 2, 2000 – as on other nights where she had made late filings – Ms. Brooks had a driver waiting for her curbside outside the Pepper office building. On October 2, Ms. Brooks' normal driver made the drive to the USPTO without incident in less than ten minutes.

<sup>3</sup> See the page from the website of the National Institute of Standards and Technology ("NIST") attached hereto as Attachment A

upon her return to the Pepper office, since her driver actually did make the trip in less than ten minutes.<sup>4</sup>

When Ms. Brooks returned from the trip to the USPTO, she was in bad shape. She asked to go home – complaining of profound fatigue and severe pain, limping, and relying on her driver for support. Only at that point did I become aware that Ms. Brooks was suffering an acute flare period of her FMS.

After Ms. Brooks' failed attempt to file the applications at the USPTO before the midnight deadline, we did everything possible to cure the situation. Our approach was to file the applications by Express Mail in a time zone West of Washington, D.C., where it was still October 2. At 12:23 am on October 3, Washington, DC time, I tried to reach the in-house patent practitioner with Fred Hutch in Seattle, Washington, with whom we had been working on the Fred Hutch filings, but was unsuccessful in having her file the applications by Express Mail from Seattle, Washington.<sup>5</sup>

I then tried a colleague in California at 12:42 am. He was at home and agreed to try to help. We therefore started to fax the applications to his work fax. However, it soon became clear that, due to the length of the applications, it was uncertain that they could be faxed to California in enough time to permit a successful filing by Express Mail before midnight California time.

Thus, by 1:49 am, we began randomly calling patent practitioners listed on the USPTO website Attorney and Agent Roster as being resident in Hawaii. Through this process we identified Jack E. Bennett, an attorney and practitioner who was a stranger to the situation and

---

<sup>4</sup> The late night drive to the PTO consistently took less than ten minutes. Ms. Brooks' condition undoubtedly must have slowed the trip to the waiting car at a point when time was of the essence.

<sup>5</sup> All times of phone conversations come from the toll call report from my office phone number.

who had no prior connection with members of the Pepper patent group, Pepper, UNC, Fred Hutch, or for that matter any other of Pepper's clients.

Mr. Bennett was initially contacted at 2 am, Washington, D.C. time or 8:00 pm Hawaii time. He was at first unwilling to assist in the filing of the applications by Express Mail, but did give us the name of another practitioner in Hawaii. She was not available, so we made a few more calls to Hawaii without success. Consequently, we called Mr. Bennett back at 2:47 am Washington time or 8:47 pm Hawaii time and asked again if he would help. This time Mr. Bennett agreed.

Therefore, I proceeded to explain to Mr. Bennett what needed to be done, i.e., print the application, and then attach the appropriate cover sheet and any applicable drawing, fill out the Certificate of Express Mail and mail the applications via Express Mail. All applications were e-mailed to Mr. Bennett, one by one, between 3:30 am and 4:21 am. At this point, I instructed Mr. Bennett to be sure to prepare and file the UNC applications first. Then, all of the relevant cover sheets, certificates of mail and drawings were faxed to Mr. Bennett at his work fax number. I last spoke to Mr. Bennett at 5:06 am Washington, D.C. time or 11:06 pm Hawaii time and wished him good luck. I called again at 6:35 am Washington, D.C. time or 12:35 am Hawaii time to learn what had transpired but only reached his answering machine. We learned what happened via an e-mail from Mr. Bennett at 8:32 am Washington, D.C. time or 2:43 am Hawaii time. That e-mail is attached as Appendix A to Mr. Bennett's verified statement.

Mr. Bennett has been paid in full for his services. He has no expectation for any other work from Pepper or its clients and thus has no economic interest in this case.

Subsequently, I logged into the United States Postal Service website to track the packages sent by Mr. Bennett by Express Mail. The print out for each of the six packages is attached hereto as Attachment B. In addition, the USPTO asked for Correction of Defects in several of

the PCT applications. The returned pages included some of the certificates of mailing executed by Mr. Bennett on October 2, 2000. Those certificates of mailing are attached hereto as Attachment C.

\* \* \*

Ms. Brooks failure to deposit the applications directly in the USPTO mail room could not have been prevented, because the sudden aggravation of her condition could not have been anticipated or avoided. We had no way of knowing that she would be unable to carry out her duty of timely completing the filing particulars and personally file the applications in the USPTO mail room pursuant to standard office practice. I had not seen much of Ms. Brooks during the day until about 11 pm as we were trying to finalize the applications. Even then, before her return from the USPTO, Ms. Brooks never complained or indicated the level of her discomfort or pain. Furthermore, during the day of October 2, 2000, it was not apparent that Ms. Brooks was suffering from an acute flare-up of her condition that would materially impact her ability to perform her duties as she spent most of the day in her office and did not have much contact with others at Pepper.

**Attachment A**



## NIST Frequently Asked Questions

### What is the current Coordinated Universal Time?

NIST and the U.S. Naval Observatory jointly operate a web site that provides the Official U.S. Time at <http://www.time.gov>. Readings from the clocks of these two agencies contribute to world time, called Coordinated Universal Time (UTC).

NIST offers several alternatives for accessing NIST time by telephone. To hear the same WWV time announcements by phone that you would hear using a shortwave radio, call (303) 499-7111. This is not a toll-free call, except in the local Boulder/Denver, CO, area. Your call will be automatically cut off after approximately 3 minutes. To hear the similar WWVH time announcements from Hawaii, call (808) 335-4363.

To synchronize your computer's clock to NIST time see [Set Your Computer's Clock to NIST Time](#).

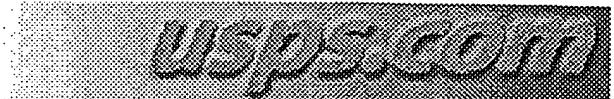
To learn more about NIST's new super accurate atomic fountain clock--which shares the distinction with a similar instrument in Paris as the most accurate clock in the world--see [this press release](#) and accompanying illustrations.

[Other Frequently Asked Questions about Time and Frequency](#)

[Ask another question.](#)

Last update: Dec. 30, 1999  
Questions or Comments: [Gail Porter](#)

**Attachment B**

[Home](#)

## TRACK/CONF

### Delivery Status

You entered EJ081848647US

Your item arrived at 20096 at 9:09 am on October 5 and is scheduled for delivery.

#### Here is what happened earlier:

- October 3 7:50 am ENROUTE HONOLULU HI 96820
- October 3 7:18 am ACCEPT OR PICKUP HONOLULU HI 96820

Enter the number from your shipping receipt into the field below.

Item Number:

You can track delivery of **Express Mail** and **Global Express Guaranteed** and confirm delivery for domestic **Priority Mail** and **Parcel Post**.

© 1999 United States Postal Service *"Fly Like an Eagle."* The official logo of the United States Postal Service, featuring a stylized eagle with wings spread wide.

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A rectangular stamp with the words "USPS DELIVERY CONFIRMATION" in a stylized font.

## TRACK/CONFIRM

[Delivery Status](#)**You entered EJ081848655US**

Your item arrived at 20096 at 9:09 am on October 5 and is scheduled for delivery.

**Here is what happened earlier:**

- October 3 9:03 am ENROUTE HONOLULU HI 96820
- October 3 7:46 am ACCEPT OR PICKUP HONOLULU HI 96820

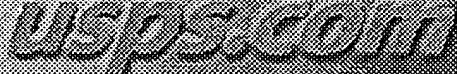
Enter the number from your shipping receipt into the field below.

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## TRACK/CONF

**SEARCH STATUS**

**You entered EJ068731241US**

Your item arrived at 20096 at 9:09 am on October 5 and is scheduled for delivery.

**Here is what happened earlier:**

- October 3 7:50 am ENROUTE HONOLULU HI 96820
- October 3 7:30 am ACCEPT OR PICKUP HONOLULU HI 96820

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Home

## TRACK/CONFIRM

Delivery Status

You entered EJ068107005US

Your item arrived at 20096 at 9:09 am on October 5 and is scheduled for delivery.

Here is what happened earlier:

- October 3 7:50 am ENROUTE HONOLULU HI 96820
- October 3 7:30 am ACCEPT OR PICKUP HONOLULU HI 96820

Enter the number from your shipping receipt into the field below.

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You can track delivery of **Express Mail** and **Global Express Guaranteed** and confirm delivery for domestic **Priority Mail** and **Parcel Post**.

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[Home](#)

A large, stylized stamp that reads "DELIVERY CONFIRMED" in a bold, blocky font.

## TRACK/CONFIRM

[SEARCH STATUS](#)**You entered EJ068106968US**

Your item arrived at 20096 at 9:12 am on October 5 and is scheduled for delivery.

**Here is what happened earlier:**

- October 3 7:50 am ENROUTE HONOLULU HI 96820
- October 3 7:33 am ACCEPT OR PICKUP HONOLULU HI 96820

Enter the number from your shipping receipt into the field below.

Item Number: 

You can track delivery of **Express Mail** and **Global Express Guaranteed** and confirm delivery for domestic **Priority Mail** and **Parcel Post**.

A small version of the "Delivery Confirmed" stamp seen at the top of the page.

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**Attachment C**

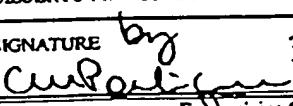
414 Rec'd PCT/PTO 03 OCT 2000

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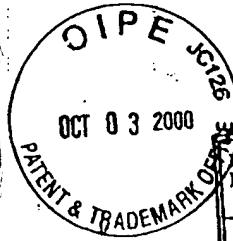
PCT INTERNATIONAL APPLICATION TRANSMITTAL LETTER		DATE 2 October 2000	PCT/US 00/27428														
REGARDING THE INTERNATIONAL APPLICATION OF UNIVERSITY OF NORTH CAROLINA		DOCKET OR REFERENCE NUMBER 113918.502															
ENTITLED PROCESSES FOR CLONAL GROWTH OF HEPATIC PROGENITOR CELLS																	
Certificate under 37 CFR 1.10 (if applicable)																	
<u>EJ081848664US</u> <small>Express Mail mailing number</small>		10/2/2000 <small>Date of Deposit</small>															
<p>I hereby certify that this application is being deposited with the United States Postal Service Express Mail Post Office to Addressee service under 37 CFR 1.10 on the date indicated above and is addressed to the Commissioner of Patents and Trademarks, Washington, DC 20231.</p> <p><u>Jack E. Bennett</u> <small>(Typed or printed name of person mailing application)</small></p> <p><i>[Signature]</i> <small>(Signature of person mailing application)</small></p>																	
<p>To the United States Receiving Office (RO/US):</p> <p>Accompanying this transmittal letter is the above-identified International application, including a completed Request form (PCT/RO/101). Please process the application according to the provisions of the Patent Cooperation Treaty.</p> <p>The following requests are made of the RO/US:</p>																	
<p>1. <input checked="" type="checkbox"/> PREPARATION AND TRANSMITTAL OF CERTIFIED COPY OF PRIORITY DOCUMENTS - Please prepare and transmit to the International Bureau a certified copy of the United States origin priority documents identified in Box VI of the Request form (37 CFR 1.451). To cover the cost of copy preparation and certification (37 CFR 1.19(a)(3) and (b)(1)).</p> <p><input type="checkbox"/> a (check) money order in the amount of \$ _____ is attached to this transmittal letter.</p> <p><input type="checkbox"/> the RO/US is hereby authorized to charge the following deposit account no.: <u>50-0436</u>.</p> <p>The appropriate Search fee for the above-named Authority is indicated on the Fee Calculation Sheet (PCT/RO/101 Annex).</p> <p>2. <input type="checkbox"/> SUPPLEMENTAL SEARCH FEES (ONLY WHEN ISA/US CONDUCTS THE INTERNATIONAL SEARCH) - Please charge any Supplemental Search fees that may be required by the United States International Searching Authority (ISA/US) to deposit account no.: _____</p> <p><i>I understand that this authorization is subject to my oral confirmation thereof in each instance and that it in no way limits my right to submit a protest against payment of the Supplemental Search fees, but is merely an administrative aid to assure that the ISA/US may timely complete the Search Report.</i></p>																	
<p>NOTE: SUPPLEMENTAL SEARCH FEES FOR IS/EP ARE PAYABLE DIRECTLY TO THE EUROPEAN PATENT OFFICE</p> <p>3. <input checked="" type="checkbox"/> DISCLOSURE INFORMATION - In order to assist in screening the accompanying International application for purposes of determining whether a license for foreign transmittal should and could be granted, the following information is supplied:</p> <ul style="list-style-type: none"> <li>A. <input type="checkbox"/> There is no prior filed application relating to this invention.</li> <li>B. <input checked="" type="checkbox"/> There is a prior application*, serial number 60/157,003 filed on <u>1 October 2000</u> which contains subject matter that is <ul style="list-style-type: none"> <li>1. <input type="checkbox"/> substantially identical to that of the accompanying International application.</li> <li>2. <input type="checkbox"/> less than that of the accompanying International application. The additional subject matter of the International application appears on page(s) and line(s).</li> <li>3. <input checked="" type="checkbox"/> more than that of the accompanying International application.</li> </ul> </li> <li>C. <input type="checkbox"/> Disclosure information cannot be covered by the language of Points 3A or 3B above due to the involvement of several prior applications or for other reasons. A separate sheet on which the disclosure information is explained is attached to this transmittal letter.</li> </ul> <p>4. <input checked="" type="checkbox"/> REQUEST FOR FOREIGN TRANSMITTAL LICENSE - According to the provisions of 35 USC 184 and 37 CFR 5.11, a license to transmit the accompanying International application to foreign agencies or international authorities is hereby requested.</p>																	
<p>*Priority is not claimed, unless all necessary information is listed in Box VI of the Request Form (PCT/RO/101).</p> <table border="1"> <tr> <td>SIGNER IS THE</td> <td>NAME OF SIGNER (typed)</td> </tr> <tr> <td><input type="checkbox"/> Applicant</td> <td>Corinne M. Pouliquen</td> </tr> <tr> <td><input type="checkbox"/> Common Representative</td> <td></td> </tr> <tr> <td><input checked="" type="checkbox"/> (Attorney/Agent) Reg. No.</td> <td></td> </tr> <tr> <td colspan="2">SIGNATURE</td> </tr> <tr> <td colspan="2"><i>Corinne M. Pouliquen 35753</i></td> </tr> <tr> <td colspan="2">For recieving Office use only</td> </tr> </table>				SIGNER IS THE	NAME OF SIGNER (typed)	<input type="checkbox"/> Applicant	Corinne M. Pouliquen	<input type="checkbox"/> Common Representative		<input checked="" type="checkbox"/> (Attorney/Agent) Reg. No.		SIGNATURE		<i>Corinne M. Pouliquen 35753</i>		For recieving Office use only	
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SIGNATURE																	
<i>Corinne M. Pouliquen 35753</i>																	
For recieving Office use only																	

10-05-00

414 Rec'd PCT/PTO 03 OCT 2000

PCT INTERNATIONAL APPLICATION TRANSMITTAL LETTER	DATE 02 October 2000	PCT/US 00/27430
REGARDING THE INTERNATIONAL APPLICATION OF TBA	DOCKET OR REFERENCE NUMBER 112913.402	
ENTITLED INTERFERING WITH TELOMERE MAINTENANCE IN TREATMENT OF DISEASES		
Certificate under 37 CFR 1.10 (if applicable)		
<u>EJ068106968US</u> Express Mail mailing number		10/2/2000 Date of Deposit
I hereby certify that this application is being deposited with the United States Postal Service Express Mail Post Office to Addressee service under 37 CFR 1.10 on the date indicated above and is addressed to the Commissioner of Patents and Trademarks, Washington, DC 20231.		
<u>Jack E. Bennett</u> (Typed or printed name of person mailing application)		 (Signature of person mailing application)
To the United States Receiving Office (RO/US):		
Accompanying this transmittal letter is the above-identified International application, including a completed Request form (PCT/RO/101). Please process the application according to the provisions of the Patent Cooperation Treaty.		
The following requests are made at the RO/US:		
<p>1. <input checked="" type="checkbox"/> PREPARATION AND TRANSMITTAL OF CERTIFIED COPY OF PRIORITY DOCUMENTS - Please prepare and transmit to the International Bureau a certified copy of the United States origin priority documents identified in Box VI of the Request form (37 CFR 1.451). To cover the cost of copy preparation and certification (37 CFR 1.19(a)(3) and (b)(1)).</p> <p><input type="checkbox"/> a (check) (money order) in the amount of \$ _____ is attached to this transmittal letter.</p> <p><input checked="" type="checkbox"/> the RO/US is hereby authorized to charge the following deposit account no.: <u>50-0436</u>.</p> <p>The appropriate Search fee for the above-named Authority is indicated on the Fee Calculation Sheet (PCT/RO/101 Annex).</p> <p>2. <input type="checkbox"/> SUPPLEMENTAL SEARCH FEES (ONLY WHEN ISA/US CONDUCTS THE INTERNATIONAL SEARCH) - Please charge any Supplemental Search fees that may be required by the United States International Searching Authority (ISA/US) to deposit account no.: _____</p> <p>I understand that this authorization is subject to my oral confirmation thereof in each instance and that it in no way limits my right to submit a protest against payment of the Supplemental Search fees, but is merely an administrative aid to assure that the ISA/US may timely complete the Search Report.</p>		
NOTE: SUPPLEMENTAL SEARCH FEES FOR ISA/EP ARE PAYABLE DIRECTLY TO THE EUROPEAN PATENT OFFICE		
<p>3. <input checked="" type="checkbox"/> DISCLOSURE INFORMATION - In order to assist in screening the accompanying International application for purposes of determining whether a license for foreign transmittal should and could be granted, the following information is supplied:</p> <p>A. <input type="checkbox"/> There is no prior filed application relating to this invention.</p> <p>B. <input checked="" type="checkbox"/> There is a prior application*, serial number <u>60/156,938</u> filed on <u>30 SEPTEMBER 1999</u> which contains subject matter that is</p> <ol style="list-style-type: none"> <li>1. <input checked="" type="checkbox"/> substantially identical to that of the accompanying International application.</li> <li>2. <input type="checkbox"/> less than that of the accompanying International application. The additional subject matter of the International application appears on page(s) and line(s).</li> <li>3. <input type="checkbox"/> more than that of the accompanying International application.</li> </ol> <p>C. <input type="checkbox"/> Disclosure information cannot be covered by the language of Points 3A or 3B above due to the involvement of several prior applications or for other reasons. A separate sheet on which the disclosure information is explained is attached to this transmittal letter.</p> <p>4. <input checked="" type="checkbox"/> REQUEST FOR FOREIGN TRANSMITTAL LICENSE - According to the provisions of 35 USC 184 and 37 CFR 5.11, a license to transmit the accompanying International application to foreign agencies or international authorities is hereby requested.</p>		
*Priority is not claimed, unless all necessary information is listed in Box VI of the Request Form (PCT/RO/101).		
SIGNER IS THE	NAME OF SIGNER (typed) GILBERTO M. VILLACORTA	
<input type="checkbox"/> Applicant <input type="checkbox"/> Common Representative <input checked="" type="checkbox"/> Attorney/Agent Reg. No. 34.038	SIGNATURE  <u>35,753</u>	

For Receiving Office use only



44-17600 PCT/US 00/27462

PCT INTERNATIONAL APPLICATION TRANSMITTAL LETTER REGARDING THE INTERNATIONAL APPLICATION OF TBA	DATE 02 October 2000 DOCKET OR REFERENCE NUMBER 112913.211
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ENTITLED  
TARGETING CELLS HAVING MAD2 MUTATION FOR TREATMENT AND/OR PREVENTION OF DISEASE

Certificate under 37 CFR 1.10 (if applicable)

EJ081848647 (S)

Express Mail mailing number

I hereby certify that this application is being deposited with the United States Postal Service Express Mail Post Office to Addressee service under 37 CFR 1.10 on the date indicated above and is addressed to the Commissioner of Patents and Trademarks, Washington, DC 20231.

Jack E. Bennett  
(Typed or printed name of person mailing application)

10/2/2000  
Date of Deposit

  
(Signature of person mailing application)

To the United States Receiving Office (R.O./US):

Accompanying this transmittal letter is the above-identified International application, including a completed Request form (PCT/RO/101). Please process the application according to the provisions of the Patent Cooperation Treaty.

The following requests are made of the R.O./US:

1.  PREPARATION AND TRANSMITTAL OF CERTIFIED COPY OF PRIORITY DOCUMENTS - Please prepare and transmit to the International Bureau a certified copy of the United States origin priority documents identified in Box VI of the Request form (37 CFR 1.451). To cover the cost of copy preparation and certification (37 CFR 1.19(a)(3) and (b)(1)).  
 a (check) (money order) in the amount of \$ \_\_\_\_\_ is attached to this transmittal letter.  
 the R.O./US is hereby authorized to charge the following deposit account no.: 50-0436.
2.  The appropriate Search fee for the above-named Authority is indicated on the Fee Calculation Sheet (PCT/RO/101 Annex).  
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*I understand that this authorization is subject to my oral confirmation thereof in each instance and that it in no way limits my right to submit a protest against payment of the Supplemental Search fees, but is merely an administrative aid to assure that the ISA/US may timely complete the Search Report.*

NOTE: SUPPLEMENTAL SEARCH FEES FOR ISA/EP ARE PAYABLE DIRECTLY TO THE EUROPEAN PATENT OFFICE

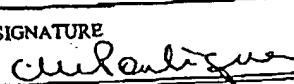
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- A.  There is no prior filed application relating to this invention.
- B.  There is a prior application\*, serial number 60/156,939 filed on 30 SEPTEMBER 1999 which contains subject matter that is
  1.  substantially identical to that of the accompanying International application.
  2.  less than that of the accompanying International application. The additional subject matter of the International application appears on page(s) and line(s).
  3.  more than that of the accompanying International application.

C.  Disclosure information cannot be covered by the language of Points 3A or 3B above due to the involvement of several prior applications or for other reasons. A separate sheet on which the disclosure information is explained is attached to this transmittal letter.

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\*Priority is not claimed, unless all necessary information is listed in Box VI of the Request Form (PCT/RO/101).

SIGNER IS THE <input type="checkbox"/> Applicant <input type="checkbox"/> Common Representative <input checked="" type="checkbox"/> (Attorney/Agent) Reg. No 34,038	NAME OF SIGNER (typed) GILBERTO M. VILLACORTA SIGNATURE  35,753 For receiving Office use only
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RECEIVED

APR 18 2001

OFFICE OF PETITIONS

VERIFICATION

WASHINGTON )  
DISTRICT OF COLUMBIA )

Corinne M. Pouliquen, being first duly sworn, deposes and says that she has read her foregoing Verified Statement, knows the contents thereof, and that the same are true and correct as stated.

Corinne M. Pouliquen  
Corinne M. Pouliquen

Subscribed and sworn to before  
me this 20 day of December 2000.

Robert J. Miller  
Notary Public

My commission expires: 10/14/2001

VERIFIED STATEMENT  
OF  
JUDITH G. CARATENUTO

My name is Judith G. Caratenuto. I am Director of Administration in the Washington office of Pepper Hamilton LLP ("Pepper"). I have supervisory authority over the non-lawyer staff in the Pepper Washington office. I have been asked to provide some background on Courtenay J. Brooks, a legal assistant employed by Pepper between August 14 and November 10, 2000.

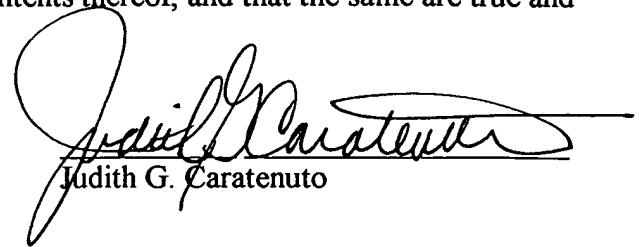
In the course of the employment application process at Pepper, Ms. Brooks disclosed that she suffered from Fibromyalgia Syndrome ("FMS") -- a medical condition which affects the muscles and connective tissues of the body. Ms. Brooks indicated that she experienced flare periods when she lost full use of her limbs and required the assistance of a cane to walk. During flare periods, Ms. Brooks had received medical orders to work from home. Because Ms. Brooks was known as a competent patent legal assistant by two Pepper lawyers who had worked with her at another firm, Pepper hired Ms. Brooks and agreed to accommodate her permitting her to work at home during flare periods.

During her employment with Pepper, it was widely known that Ms. Brooks suffered from FMS. However, Ms. Brooks only missed a limited number of days due to her FMS condition. In fact, between her August 14, 2000 hiring date and October 2, 2000 (the date of the unsuccessful filing at the United States Patent and Trademark Office), Ms. Brooks FMS condition required her to stay home on only six days. While Ms. Brooks periodically seemed to be in pain during days on which she worked in the office, her FMS condition, prior to October 2, had not appeared to adversely affect her work.

VERIFICATION

WASHINGTON )  
DISTRICT OF COLUMBIA )

Judith G. Caratenuto, being first duly sworn, deposes and says that she has read her foregoing Verified Statement, knows the contents thereof, and that the same are true and correct as stated.



Judith G. Caratenuto

Subscribed and sworn to before  
me this 20 day of December 2000.

Susan B. Juelz  
Notary Public

My Commission expires: Oct. 14, 2001

# National Fibromyalgia Research Association

Dedicated to Education, Treatment, and Finding a Cure for Fibromyalgia

## Fibromyalgia Syndrome Diagnostic Criteria

Fibromyalgia is a distinctive syndrome which can be diagnosed with clinical precision. It may occur in the absence (primary fibromyalgia) or presence of other conditions such as rheumatoid arthritis or systemic lupus erythematosus (concomitant fibromyalgia). It is rarely secondary to another disease, in the sense that alleviation of the associated disease also cures the fibromyalgia. It may be confidently diagnosed in patients with widespread musculo-skeletal pain and multiple tender points.

---

### The American College of Rheumatology 1990 Criteria for the Classification of Fibromyalgia

#### History of widespread pain has been present for at least three months

**Definition:** Pain is considered widespread when all of the following are present:

- Pain in both sides of the body
- Pain above and below the waist

In addition, axial skeletal pain (cervical spine, anterior chest, thoracic spine or low back pain) must be present. Low back pain is considered lower segment pain.

#### Pain in 11 of 18 tender point sites on digital palpation

**Definition:** Pain, on digital palpation, must be present in at least 11 of the following 18 tender point sites:

- Occiput* (2) - at the suboccipital muscle insertions.
- Low cervical* (2) - at the anterior aspects of the intertransverse spaces at C5-C7.
- Trapezius* (2) - at the midpoint of the upper border.
- Supraspinatus* (2) - at origins, above the scapula spine near the medial border.
- Second rib* (2) - upper lateral to the second costochondral junction.
- Lateral epicondyle* (2) - 2 cm distal to the epicondyles.

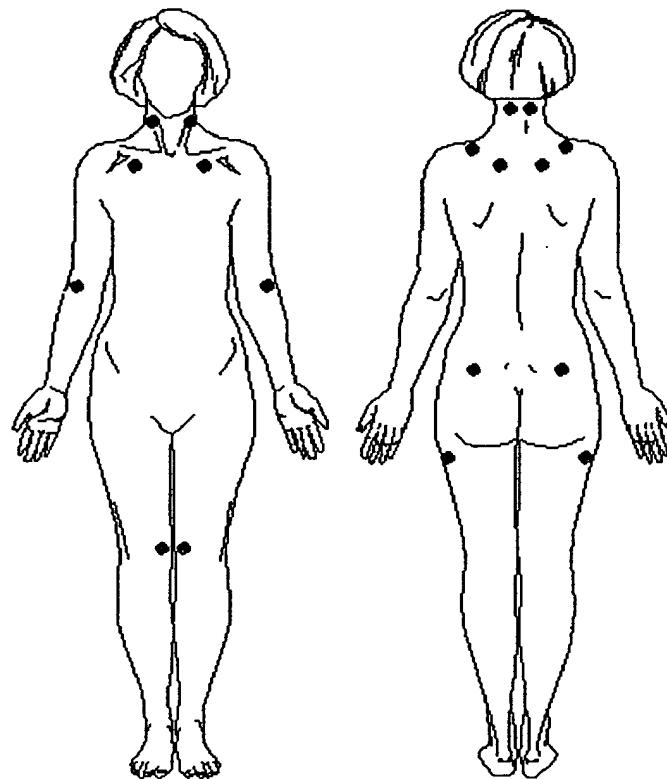
✓ *Gluteal* (2) - in upper outer quadrants of buttocks in anterior fold of muscle.

✓ *Greater trochanter* (2) - posterior to the trochanteric prominence.

✓ *Knee* (2) - at the medial fat pad proximal to the joint line.

Digital palpation should be performed with an approximate force of 4 kg. A tender point has to be painful at palpation, not just "tender."

### Illustration of Tender Points



### Fibromyalgia Syndrome Symptoms

Arthritis and Rheumatism, Vol. 33, No. 2, Feb 1990, F. Wolfe, et al.

Condition	% of FMS Symptoms
Muscular Pain	100
Fatigue	96
Insomnia	86
Joint Pains	72
Headaches	60
Restless Legs	56
Numbness and Tingling	52

Impaired Memory	46
Leg Cramps	42
Impaired Concentration	41
Nervousness	32
Depression (Major Depression)	20

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**National Fibromyalgia Research Association**  
PO Box 500, Salem, OR 97302



VERIFIED STATEMENT  
OF  
JACK E. BENNETT

My name is Jack E. Bennett. I am an attorney and a member of the bar of the State of Hawaii and of the U.S. Patent and Trademark Office (Reg. No. 40,911). I reside in Honolulu, Hawaii on the island of Oahu.

On Monday, October 2, 2000, Corinne Pouliken contacted me by telephone at my residence sometime after 8:00 p.m. Hawaii local time. Ms. Pouliken identified herself as a lawyer at Pepper Hamilton LLP in Washington, D.C. Ms. Pouliken indicated she had been trying to reach individuals listed on the U.S. Patent and Trademark Office (USPTO) web site as being registered to practice before the USPTO and who were resident in Hawaii. Ms. Pouliken stated that the patent group at Pepper had met with an extraordinary situation which had prevented the filing of a series of patent applications before the midnight deadline in Washington. Although I was a stranger to this situation and had no prior connection with Pepper or its clients, Ms. Pouliken asked me to assist her in filing those patent applications by Express Mail in Honolulu before midnight on the evening of Monday, October 2, 2000.

Agreeing to assist her, I traveled from my residence to my downtown office to receive the patent applications by electronic mail and to print and assemble the applications. During the ensuing hours, we worked as quickly as humanly possible to prepare the applications for mail deposit.

Based on common knowledge, I knew that the United States Post Office located at the Honolulu International Airport was the last post office to close each night on the island of Oahu. I traveled to the airport Post Office soon after assembling the applications. Arriving at the airport at about 11:40 p.m. on October 2, I learned that the Post Office's window service had closed earlier that evening at 8:30 p.m. I also learned that the last scheduled pick up from the Express Mail drop box had occurred still earlier at 8:00 p.m.

Nevertheless, continuing to work diligently, I purchased postage (from an automated dispenser) and prepared six prepaid express mail packages addressed to the Commissioner of Patents in Washington, D.C., each containing the US and PCT applications for a single invention. I deposited each of the six packages in the Express Mail drop box as soon as I finished the preparation of a particular package with the appropriate Express Mail labeling. All six packages were deposited between 11:55 p.m. on October 2 and 12:20 am on October 3, Hawaii time. Two of the six packages were deposited before midnight and four were deposited after midnight. Due to the urgency of the situation, I did not record nor do I know which two of the six packages were deposited before midnight.

In the early morning hours of October 3, 2000, I drafted and sent an e-mail to Ms. Pouliken documenting the Express Mail tracking numbers for each of the packages deposited at the Honolulu Airport Express Mail drop box. A copy of this e-mail is attached hereto as Appendix A. On October 4, 2000, I mailed (via U.S. mail) to Ms. Pouliken the original tracking number labels for the six packages sent under a cover letter which I had drafted and signed on October 3, 2000. A copy of this mailing is attached hereto as Appendix B. Copies of the mailing receipts I received from the United States Postal Service by mail on October 6, 2000 are attached hereto as Appendix C.

## **APPENDIX A**

**From:** Jack Bennett  
**To:** Pouliquen, Corinne  
**Date:** Tue, Oct 3, 2000 8:43 AM  
**Subject:** Biotech Patent Submittal

Please see attached.

## **APPENDIX B**

October 3, 2000

Jack Bennett  
1717 Mott-Smith Dr. 1404  
Honolulu, HI 96822  
(808) 521-8749

Corinne M. Pouliquen  
Pepper Hamilton LLP  
Hamilton Square  
600 Fourteenth Street, N.W.  
Washington, DC 20005-2004

**Re: Biotech Patent Application Submittal**

Dear Corinne,

Enclosed, please find the original tracking numbers from the Express Mail packages sent. These provide the temporary receipts I referred to in earlier e-mails. Tracking numbers for each application sent are:

MAD2	EJ081848647US
MEC1	EJ081848655US
Clonal	EJ081848664US
Biopotent	EJ068731241US
SIC1	EJ068107005US
Telomere	EJ068106968US

I will forward the official label receipts when I receive them. My address was recorded as the return address on the packages to provide proof of my involvement should you need me to verify to a third party that the items were sent.

Also enclosed is a copy of receipts for postal costs. Please let me know if you need additional information or a signed letter of confidentiality. I hope everything worked out for the best!

Sincerely,



Jack Bennett

## **APPENDIX C**

Dear Corinne,

I hope we were successful in meeting the application deadline. Mailing information is included below. Each mailing label included a temporary receipt that I retained and an additional "official" receipt that will be sent to me by mail. I will forward to you the temp. receipts today (via Express Mail) and the official receipts when I receive them.

Six packages were sent between 11:55 pm (Oct. 2) and 12:20 am (Oct. 3) via Express Mail. Each package contained the US and PCT application for a single invention. Post office location and tracking numbers are as follows:

US Post Office  
Honolulu International Airport  
3600 Aolele St.  
Honolulu, Hawaii 96819  
Location ID No. 968200005

Express Mail Collection Times:

Monday - Friday  
3:00 PM  
6:00 PM  
8:00 PM

Window Service Hours: 7:30 AM - 8:30 PM

The airport office stays open the latest of all the Honolulu offices.

For postal delivery/tracking info.:

800-222-1811  
[www.usps.gov](http://www.usps.gov)

MAD2	EJ081848647US	Postage \$23.50
MEC1	EJ081848655US	Postage \$23.50
Clonal	EJ081848664US	Postage \$23.50
Biopotent	EJ068731241US	Postage \$23.50
SIC1	EJ068107005US	Postage \$24.55
Telomere	EJ068106968US	Postage \$25.60
Receipts	EJ081856780US	Postage \$11.75

Please contact me at the phone numbers provided below should you have any questions or desire additional information. Also, please feel free to contact me in the future for similar delivery service.

Sincerely,

Jack E. Bennett  
Patent Attorney  
BSME, BSEE (expected in May 2001)

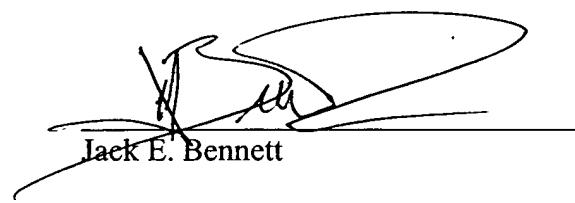
1717 Mott-Smith Dr. 1404  
Honolulu, HI 96822  
home: 808-521-8749  
work: 808-523-8874



VERIFICATION

STATE OF HAWAII ) ss:  
CITY & COUNTY OF HONOLULU )

Jack E. Bennett, being first duly sworn, deposes and says that he has read his foregoing Verified Statement, knows the contents thereof, and that the same are true and correct as stated.



Jack E. Bennett

Subscribed and sworn to before  
me this 8<sup>th</sup> day of December 2000.



Debra A. Hardottle

Notary Public

DEBRA A. HARDOTTE  
Notary Public, First Judicial Circuit  
State of Hawaii  
My commission expires: June 17, 2002

EJ068106968US

EJ068107005US

EJ068731241US

EJ081848664US

EJ081848655US

EJ081848647US















G000 The USPS and Mailing Standards

G010 Basic Business Information

## G011 Post Offices and Postal Services

01  
1

**Summary** G011 describes the opening and closing of post offices, holiday service, and the territories and possessions that are eligible for domestic rates. It also covers consumer complaints, inquiries, and Private Express Statutes.

### 1.0 POST OFFICES

**Establishment** The USPS establishes and maintains post offices, stations, and branches for customer convenience.

**Closing or Consolidation** Under 39 U.S. Code (USC) 404(b), any decision to close or consolidate a post office must be based on certain criteria. These include the effect on the community served; the effect on employees of the post office; compliance with government policy established by law that the USPS must provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining; the economic saving to the USPS; and other factors that the USPS determines necessary. In addition, certain mandatory procedures apply.

**Procedures** The *Postal Operations Manual* contains USPS rules for discontinuing, consolidating, or suspending service at an existing post office or other postal facility; changing a post office or other postal facility name; setting public business hours of postal facilities; and using bulletin boards and handling lost articles found in public areas of postal facilities.

**Military Post Offices** Military post offices (MPOs) are branches of a U.S. civil post office, operated by the Army, Navy, Air Force, or Marine Corps to serve military personnel overseas or aboard ships. The term includes Army post offices (APOs) for the U.S. Army and the U.S. Air Force and fleet post offices (FPOs) for the U.S. Navy and the U.S. Marine Corps. MPOs provide postal service for military personnel where the U.S. civil postal service does not operate and a military situation requires the service. MPOs are established or discontinued by the USPS only on request of the military department that operates them. Notice of these actions is published in the *Postal Bulletin*.



**Holiday Service**  
**1.5** Exhibit 1.5 shows the national holidays observed by the USPS and the service levels provided on those holidays for retail window, post office box, firm call, delivery, and collection services.

#### Exhibit 1.5 Holiday Service Levels

##### A. Holidays Widely Observed

New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day

Holiday	Retail Window	Post Office Box	Firm Call	Delivery			
				Business	Residential	Express Mail	Collection
<b>Friday</b>							
Friday (Holiday) Service	None	Holiday	None	None	None	Holiday	Time decal
Saturday Service	Limited	Normal	Normal	Normal	Normal	Normal	Normal
Sunday Service	None	Normal	None	None	None	Normal	None
<b>Saturday</b>							
Friday Service	Normal	Normal	Normal	Normal	Normal	Normal	Normal
Saturday (Holiday) Service	None	Holiday	None	None	None	Holiday	Time decal
Sunday Service	None	Normal	None	None	None	Normal	Time decal
<b>Sunday</b>							
Saturday Service	Limited	Normal	Normal	Normal	Normal	Normal	Normal
Sunday Service	None	Normal	None	None	None	Normal	None
Monday (Holiday) Service	None	Holiday	None	None	None	Holiday	Time decal <sup>1</sup>
<b>Monday</b>							
Saturday Service	Limited	Normal	Normal	Normal	Normal	Normal	Normal
Sunday Service	None	Normal	None	None	None	Normal	None
Monday (Holiday) Service	None	Holiday	None	None	None	Holiday	Time decal <sup>1</sup>
<b>Tuesday, Wednesday, or Thursday</b>							
Preceding Day Service	Normal	Normal	Normal	Normal	Normal	Normal	Normal
Holiday Service	None	Holiday	None	None	None	Holiday	Time decal

##### B. Holidays Not Widely Observed

Martin Luther King, Jr.'s Birthday; Washington's Birthday; Columbus Day; and Veterans Day

Day	Retail Window	Post Office Box	Firm Call	Delivery			
				Business	Residential	Express Mail	Collection
Saturday Service	Normal	Normal	Normal	Normal	Normal	Normal	Normal
Sunday Service	None	Normal	None	None	None	Normal	None
Monday (Holiday) Service <sup>2</sup>	Limited	Sunday	Limited	None	None	Holiday	Time decal <sup>1</sup>

Note: Exceptions to these service levels must be approved by a district manager.

1 When a holiday is observed on Monday and no residential collection is scheduled on Sunday, a full residential collection may be provided on the Monday holiday. Consecutive days without collections should be avoided.

2 Veterans Day, November 11, is the only movable holiday in the group of holidays designated as not widely observed; the other three holidays listed in section B are always observed on Mondays. When Veterans Day falls on any day except Sunday, the services provided on that holiday are the same as those shown for Monday. When Veterans Day falls on Sunday, the service levels are the same as those shown for Sunday; the USPS, however, observes the holiday on Monday and treats it as a Monday holiday.

##### Definition of Terms

Holiday—Service determined by national, area, and/or district guidelines.

Limited—Service adjusted to meet the limited needs of a community on that particular day.

Normal—Service normally provided on that particular day of the week.

Sunday—Service normally provided on Sunday for that particular service.

Time decal—Collections from boxes with decals identifying the last pickup time.

10  
11

## 2.0 MAIL SERVICE

- Domestic**
- 2.1 Domestic mail is mail transmitted within, among, and between the United States of America, its territories and possessions, Army post offices (APOs), fleet post offices (FPOs), and the United Nations, NY. For this standard, the term *territories and possessions* comprises the following:

American Samoa	Navassa Island
Manua Island, Swain's Island, Tutuila Island	Northern Mariana Islands, Commonwealth of the
Baker Island	Rota Island, Saipan Island, Tinian Island
Guam	Palmyra Atoll
Howland Island	Puerto Rico, Commonwealth of
Jarvis Island	U.S. Virgin Islands
Johnston Atoll	St. Croix Island, St. John Island, St. Thomas Island
East Island, Johnston Island, North Island, Sand Island	Wake Atoll
Kingman Reef	Peale Island, Wake Island,
Midway Atoll	Wilkes Island
Eastern Island, Sand Island, Spit Island	

- Mail Treated as Domestic Mail**
- 2.2 Mail originating in the United States of America, its territories and possessions, APOs, FPOs, and the United Nations, NY, for delivery in the Freely Associated States, and mail originating in the Freely Associated States for delivery within, among, and between the Freely Associated States and the United States of America, its territories and possessions, APOs, FPOs, and the United Nations, NY, is treated as if it were domestic mail. The term *Freely Associated States* comprises the following:

Marshall Islands, Republic of the	Micronesia, Federated States of
Ebeye Island	Chuuk (Truk) Island
Majuro Island	Kosrae Island
Palau, Republic of	Pohnpei Island
Koror Island	Yap Island

- International**
- 2.3 International mail is mail addressed to or received from foreign countries, except under 2.2. Provisions for international mail are in the *International Mail Manual*.

## 3.0 CONSUMER COMPLAINTS AND INQUIRIES

Any postal customer may complain or inquire about postal products, services, or employees at any post office or directly to the USPS Consumer Advocate (see G043 for address). A complaint or inquiry may be made in person, by telephone, by letter, or on Form 4314-A (Spanish) or Form 4314-C (English). A complaint or inquiry about the handling of a specific piece of mail should include the related envelope or wrapper and copies of all postal forms filed. A customer who is dissatisfied with the local handling of a complaint or inquiry may send a written appeal to the Consumer Advocate. A court of law can require such appeal as a legal prerequisite for hearing a customer's suit against the USPS.

## 4.0 PRIVATE EXPRESS STATUTES

- Legal Foundation**
- 4.1 By the laws known as the Private Express Statutes, Congress has generally conferred on the USPS the exclusive right to carry letters for others over post routes. USPS regulations under the Private Express Statutes are in the Code of Federal Regulations, 39 CFR 310 and 320, as amended by final rules published in the *Federal Register*. These regulations take precedence over all prior rulings and USPS publications. Copies of the regulations are available from the manager of

the Chicago Rates and Classification Service Center (RCSC) (see G042 for address).

- Definition of Letter** 4.2 For the Private Express Statutes, a *letter* is a message directed to a specific person or address and recorded in or on a tangible object. A *message* consists of any information or intelligence that can be recorded on tangible objects including, but not limited to, paper in sheet or card form, recording disks, and magnetic tapes. Certain matter is excluded from the definition of letter, e.g.: telegrams; checks and certain other instruments shipped to, from, or between financial institutions; newspapers; and periodicals. The regulations detail exclusions.
- Postage** 4.3 If the proper postage is paid, letters may be privately carried without violating the Private Express Statutes. The regulations detail compliance. Under certain circumstances, letters may be privately carried without paying postage. The principal exceptions cover letters sent with, and related in all substantial respects to, some part of the cargo or to the ordering, shipping, or delivering of the cargo; letters carried by the senders or the recipients, or by their regular salaried employees; and letters carried to or from a postal facility where they are to be or have been carried in the mail. The regulations detail exceptions.
- Suspensions** 4.4 Limited suspensions of the Private Express Statutes specify the conditions under which: (a) private couriers may carry data-processing materials, international ocean carrier documents, extremely urgent letters, and advertisements incidental to the shipment of accompanying merchandise or periodicals; and (b) universities and colleges may carry the letters of their bona fide student and faculty organizations. Carriers wanting to use the suspension for data-processing materials must file a notice of their intention on a form available from the manager of the Chicago RCSC.
- Violations** 4.5 The Chicago RCSC reviews initial reports of possible violations of the Private Express Statutes. When warranted by the facts, possible violations are forwarded to the USPS General Counsel for further action.
- Legal Advice** 4.6 The public and USPS employees can obtain authoritative advice on the Private Express Statutes, including written advisory opinions, by contacting the Senior Counsel, Ethics and Information, USPS Headquarters (see G043 for address).

## 5.0 POSTAL LAW VIOLATIONS

Instructions on mail security as it relates to unauthorized opening, inspection, tampering, or delay of mail are in *Administrative Support Manual* 274. Information and complaints on a possible postal law violation must be sent to the appropriate address according to the ZIP Code ranges shown below:

POSTAL INSPECTION SERVICE PO BOX 2613 JERSEY CITY NJ 07303-2613	003-079, 08005, 08006, 08008, 08050, 08087, 08092, 08501-08504, 08506-08510, 08512-08514, 08516, 08517, 08519-08553, 08555-08561, 08600-08639, 08642-08691, 087-098, 100-149
POSTAL INSPECTION SERVICE 225 N HUMPHREYS BLVD MEMPHIS TN 38120-2149	08001-08004, 08007, 08009-08049, 08051-08086, 08088-08091, 08093-08099, 081-084, 08505, 08511, 08515, 08518, 08554, 08562, 08640-08641, 150-39776, 700-799
POSTAL INSPECTION SERVICE 222 S RIVERSIDE PLZ STE 1250 CHICAGO IL 60606-6100	400-693, 800-884, 850-999